UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, et al.,

Plaintiffs,

v. Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN
GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION FOR REVIEW BY THREE-JUDGE PANEL OF JUDGE STADTMUELLER'S ORDERS OF DECEMBER 8, 2011, AND DECEMBER 20, 2011, PURSUANT TO 28 U.S.C. § 2284(c)(3) AND OPPOSITION TO PLAINTIFFS' IMPROPER MOTION FOR SANCTIONS

The Seventh Circuit describes the confidentiality between an attorney and client as "sacrosanct." *Cromley v. Board of Educ. of Lockport Tp. High School Dist. 205*, 17 F.3d 1059, 1166 (7th Cir. 1994); *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *Analytica, Inc. v. NPD Research, Inc*., 708 F.2d 1263, 1278 (7th Cir. 1983); *Freeman v. Chicago Musical Instrument Co*., 689 F.2d 715, 721 (7th Cir. 1982). The Seventh Circuit is not being dramatic when its selects this adjective. The attorney-client privilege is fundamental to our system of civil justice. It is to this end that the Legislature resists discovery into privileged areas because privilege is something worth fighting to protect and because there is no way to unring the bell if privilege is lost.

The Legislature objects to plaintiffs' insinuation that the Legislature is using privilege as a pretext to delay or obstruct these proceedings. The true facts tell a much different story. The Legislature has made witnesses available for depositions and has endeavored to expedite the

remaining disagreements over privilege. Indeed, the parties agreed to an expedited framework for seeking review of the December 8 and December 20 Orders. As Mr. Polland's own declaration explains: "a stipulation was entered on the record allowing counsel for the legislature and defendants to continue to assert objections and instruct the witness not to answer based on privilege, with the assumption that the legislature would pursue an appeal of the Court's order by the end of the week." (Dkt. # 89, ¶ 13). The Legislature accommodated this demand, filing its motion within 72 hours of the December 20 Order. Plaintiffs' motion for "sanctions" against the Legislature ***for following the agreed upon framework*** is as surprising as it is disappointing. As discussed below, plaintiffs' motion is also procedurally improper. The Court should deny plaintiffs' motion.

I. The December 8 and 20 Orders are Unclear Whether They Represented the Decisions of the Entire Court.

The Orders are at least ambiguous as to whether they are decisions of the full Court or if Judge Stadtmueller was acting in the stead of the entire Court, as he is authorized by statute to do. Given the ambiguity in the record, the Legislature filed this motion to avoid seeking relief in the Seventh Circuit or Supreme Court only to have that relief denied for failing to first seek relief from the full Court. Although Plaintiffs assert that the Orders are clear on their face that they represent the decision of all three judges on the Court, this is not actually so. As illustration, compare the *Fair Map* decision (Dkt # 83, Ex. 1, pg. 49) to the Orders under review (Dkt. # 74, pg. 7 and Dkt. # 82, pg. 8). The *Fair Map* decision bears the signatures of all three judges and the Orders under review do not.

Plaintiffs make an inexact analogy to court of appeals' decisions, arguing that "***the only difference*** [between a Seventh Circuit decision and that of a three-judge court] being that, at the Seventh Circuit, the author's name appears before the opinion rather than as a signature."

Opposition Brief at 8 (emphasis added). This is not true. The governing statutes creating both courts are very different. For courts of appeals, "[a] majority of the number of judges authorized to constitute a court or panel thereof, …, shall constitute a quorum." 28 U.S.C. § 46(d). Courts of appeals are not permitted to render decisions of a single judge as a matter of ***statute***.

On the other hand, Congress did authorize single judges on three-judge courts to act on behalf of the entire court stating that a "single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection." 28 U.S.C. § 2284(b)(3). Congress further provided that "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment." *Id*.

Ultimately, this issue is academic. The Court certainly knows whether the challenged Orders represent the decision of the entire three-judge court. If the Orders were not the decisions of the full Court, the Legislature is entitled to review by the full Court pursuant to 28 U.S.C. § 2284(b)(3). If the Orders do reflect the decision of the full Court, the Legislature respectfully requests a clearer record so it may perfect its rights to seek further review with the appropriate court.

II. Contrary to Plaintiffs' Assertions, the Legislature Has and Continues to Cooperate During Discovery.

Plaintiffs try to create the misleading perception that the Legislature has been thwarting discovery; this is simply not true. The Legislature has produced all witnesses for deposition. (Dkt. # 89, ¶¶ 10, 14, 12). Plaintiffs' Counsel attaches the transcripts to his declaration. (Dkt. # 89, Exs. 9, 10, 12). Plaintiffs make much of the fact that counsel asserted privilege "45 separate times." (Opposition Brief at 7). However, this combines the objections made by the Legislature with the objections made by the Government Accountability Board ("GAB"). (Dkt. # 89, ¶ 9).

The bases for the GAB objections are very different from those asserted by the Legislature. (*See* Dkt. # 91, pp. 4–7).

In fact, the Legislature asserted privilege only eleven (11) times over the course of an all-day deposition. (Dkt. # 89, ¶ 9). This is hardly an unreasonable number of objections. Further, these objections were narrow and focused upon specific areas:

- The Legislature asserted privilege to five questions regarding conversation Mr. Handrick had or guidance he received from specifically named attorneys. (Dkt. # 89, Ex. 9, pp. 89, 181–83, 185).
- The Legislature asserted privilege four times to plaintiffs' counsels' attempts to delve into the inner-workings of the Legislature's legal team by asking what "roles" specifically named counsel played on the legal team (Dkt. # 89, Ex. 9, pp. 134–35).
- The Legislature objected two times to questions regarding conversations between Mr. Handrick and legislative staff (Dkt. # 89, Ex. 9, pp. 119, 122).

That is it.

Plaintiffs also attempt to create the perception that the Legislature is claiming privilege over communications with a "litany of non-attorney, non-legislative consultants and third parties."[1] (Opposition Brief at 11). This is not true. The Legislature only claims privilege over communications with ***two*** of the ten person "litany." In fact, the Legislature has already produced communications with many of the other individuals.

[1] Although plaintiffs also revel in over-the-top conspiracy theory imagery—conjuring images of "a clubhouse and a mailbox for lawyers and non-lawyers, lobbyists and consultants, to come and go and exchange e-mail freely to provide their 'assistance' with redistricting"—the practice of conducting deliberations offsite is not uncommon or improper. For example, it is an open secret that Assembly Democratic Caucus had its redistricting workstation sent to a consulting firm called The Shop Consulting. *See, e.g., http://www.theshopconsulting.com/c_s.php.*

III. Mr. Handrick's Status as a Lobbyist is Irrelevant Because He Did Not Act in a Lobbying Capacity In His Role as a Consultant.

There is nothing mutually exclusive about being a registered lobbyist and acting as a consultant on unrelated matters, just as there is nothing mutually exclusive with being a registered lobbyists and acting as a lawyer on unrelated matters. Indeed, attorneys at Godfrey & Kahn (the firm representing Plaintiffs) are registered lobbyists and engaging in lobbying activities on behalf of their clients. *See, e.g.* Wisconsin Government Accountability Board, 2007-2008 Directory of Licensed Lobbyists, 30, 186, *available at* http://gab.wi.gov/sites/default/files/publication/68/lobbyistsdirectory 07_08_pdf_94726.pdf. Plaintiffs' Counsel's lobbyist partners would be quite surprised to learn that the privilege that they share with their clients could be extinguished because they acted as registered lobbyists on unrelated matters for unrelated clients. More to the point, Godfrey & Kahn's ***clients*** would likewise find it surprising that the privilege that they share with their trusted counsel could be called into question because their attorneys act as registered lobbyists on unrelated matters. There is no authority to support such a position. This issue is a red herring.

Plaintiffs' know full well that Mr. Handrick was not acting in a lobbying capacity in the redistricting efforts. Indeed, they have Mr. Handrick's engagement letter, which identifies what he did and for whom he did it. Moreover, Plaintiffs' counsel questioned Mr. Handrick on this topic during Mr. Handrick's deposition. (Dkt. # 89, Ex. 9, pp. 54–58). Mr. Handrick answered every question posed on this topic—recounting all of his lobbying activities to the best of his recollection—with zero objections interposed by counsel. (*Id.*) Given the supposed importance of Mr. Handrick's lobbying activities, it is dubious to assume that Plaintiffs' Counsel forgot to ask critical questions about them. If Plaintiffs honestly suspected that Mr. Handrick was acting at the behest of such organizations as the "Wisconsin Occupational Therapy Association," the

"Wisconsin Society of Land Surveyors," or "Smoke Free Wisconsin," counsel had ample opportunity to get to the bottom of it. (*See* Dkt. # 89, Ex. 9, pp. 54–58). Mr. Handrick's lobbying activities have been fully fleshed out. There is nothing there. The only evidence in the record establishes that Mr. Handrick was acting as a consultant for the Legislature and its legal counsel. Plaintiffs unsupported innuendo to the contrary cannot overcome the undisputed, facts before the Court.

IV. The Evidence Shows that Mr. Handrick Was Retained by Outside Counsel as a Consulting Expert.

Plaintiffs seem to assert that Mr. Handrick could not have been a consultant because "the legislature has the institutional knowledge, capacity, and understanding to undertake the redistricting process without a 'translator' facilitating communication with its attorneys" and because "the legislature has presented no evidence . . . Mr. Handrick has unique expertise." (Opposition Brief at 10). The first point is contradicted by plaintiffs' own pleadings. (*See* Dkt. # 1, ¶ 18) (noting that "[f]or the last three decades, . . ., the judicial branch [rather than the Wisconsin legislature] at least initially has established district boundaries to ensure the constitutional guarantees for citizens and voters.") Given this backdrop, competent counsel in conjunction with skilled consulting experts can be valuable assistants to the Legislature.

Evidence supporting the second point was discussed in the Legislature's opening brief on pages 9 and 10. Rather than address this evidence or rebut this evidence, plaintiffs pretend that it does not exist. *Cf. Gonzalez-Servin v. Ford Motor Co.*, 2011 U.S. App. LEXIS 23670, *5 (7th Cir. Nov. 23, 2011). At the risk of being repetitive, Legislature retained outside counsel to offer advice on the legality (including constitutionality) of draft redistricting proposals. However, lawyers are not redistricting map drawers. Nor are lawyers conversant in the specialized software used in the process. Mr. Handrick has recognized expertise in this area. Indeed, a

political science professor wrote a book chapter specifically about Mr. Handrick and his unique skills. Plaintiffs' counsel knows this because he questioned Mr. Handrick about it during his deposition.[2] (Dkt. # 89, Ex. 9, pp. 66–74). The evidence shows that Mr. Handrick is a recognized expert in redistricting map drawing.

V. The Legislature's Interaction with Mr. Handrick Was Privileged.

The *Fair Map* factors favor non-disclosure. Plaintiffs argue that the *Fair Map* factors only apply to the "process" employed in redistricting. (Opposition Brief at 12.) *Fair Map* makes no such assertion. Rather, the factors help the court "determine whether the need for disclosure and accurate fact finding outweighs the legislature's 'need to act free of worry about inquiry into its deliberations.'" *Committee for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 U.S. Dist. LEXIS 117656, *25-26 (N.D. Ill. Oct. 12, 2011). From this false premise, Plaintiffs argue that there is "little publicly available evidence" to support their claim. However, Plaintiffs cannot argue that public hearing minutes, statements made by lawmakers during debate, committee reports, press releases, newspaper articles, census reports, registered voter data, and election returns are not available. *See id*. at *29. Plaintiffs' arguments do not tip the balance in their favor.

Including Mr. Handrick in its deliberations did not waive the legislative privilege. As Plaintiffs now concede (*see* Opposition Brief at 12), including consultants in the legislative process does not necessarily waive legislative privilege. *ACORN v. County of Nassau*, 2007 U.S. Dist. LEXIS 71058, *19 (E.D.N.Y Sept. 25, 2007) ("*ACORN I*"); *ACORN v. County of Nassau*,

[2] Plaintiffs also seem confounded that consultants (as "non-lawyers") have any ethical obligations. (Opposition Brief at 11). Mr. Handrick understood his ethical obligations. His duty of confidentiality, for one, was spelled out in the engagement letter. (Dkt. # 78, Ex. 1).

2009 U.S. Dist. LEXIS 82405, *24 (E.D.N.Y Sept 10, 2009) ("*ACORN II*").[3] The *ACORN* courts held that the legislative privilege did not cover outside consultants while they developed their initial report, but did cover communications between the consultants and the legislature once the legislative process began. *Id*. Essentially, the *ACORN* courts bisected the process into activities which occurred prior to the start of the legislative process and those which occurred during the legislative process, with the latter being privileged. Here, Plaintiffs seek information from the protected legislative process. Indeed, Mr. Handrick provided analysis to the legislature and collaborated with the legislature throughout his involvement in the legislative redistricting process. (Handrick Dep. at 159.) According to *ACORN*, once the legislative process (i.e. drawing maps, deliberation, caucus meetings, committee hearings, etc.) began, the legislature's interaction with Mr. Handrick fell within the deliberative phase and is subject to the legislative privilege. *ACORN II*, 2009 U.S. Dist. LEXIS 82405 at *23

VI. Plaintiffs Have Failed to Follow the Procedural Rules Governing Rule 11 or Rule 37 Sanctions, and Sanctions are Otherwise Inappropriate.

Although Plaintiffs invoke no Rule of Civil Procedure supporting their motion for sanctions, the Legislature presumes that plaintiffs move pursuant to Rule 37. Certainly Plaintiffs did not follow the procedural requirements under Rule 11 requiring notice and a 21-day opportunity to cure. *See* Fed. R. Civ. P. 11(c)(2). Nevertheless, plaintiffs have likewise failed to

[3] While Plaintiffs make much of *Rodriguez v. Patacki*, 280 F. Supp. 2d 89 (S.D.N.Y) *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003), that case actually supports the Legislatures position, which the *ACORN* court acknowledged. Indeed, the *ACORN II* court noted that "action which are legislative do not begin only when the bill reaches the floor of the legislature." *ACORN II*, 2009 U.S. Dist. LEXIS 82405 at *24 (quoting *Rodriguez*, 280 F. Supp. 2d at 101). Moreover, *Rodriguez* is distinguishable in that the legislatively mandated structure of the group caused the conversations to be more like conversations with knowledgeable outsiders. *Rodriguez*, 280 F. Supp. 2d at 101. Here, there was no "legislatively mandated structure."

comply with Local Rule 37 which requires motions arising under Rule 37 must be accompanied by written certification that the parties have attempted to meet and confer.

In fact, the parties had met and conferred in this case, and they agreed to the precise procedure followed by the Legislature:

> MR. MCLEOD: This is Eric McLeod. While we were off the record we discussed a decision from Judge Stadtmiller [sic.] concerning a motion for clarification that the non-parties I represent have filed in relation to the prior motion to quash and the Court's order on that motion.
>
> We have agreed off the record that we will proceed as we had prior to this order being issued today. We will assert relevant objections we think are appropriate concerning attorney-client, attorney work product privileges and may instruct the witness not to answer on those grounds with the assumption that we will be pursuing an appeal of Judge Stadtmiller's [sic] orders concerning attorney-client, attorney work product privilege and that we'll do so by the end of this week.
>
> And if there is no action from an appellate court or other court that would result in a stay of any further deposition of Mr. Handrick or reversal of this order in a way that changes the issues here, that — and if that does not occur by the end of next week, which I believe would be the 20 — the 30th of — the Friday of next week, which I believe is the 30th of December, that we would make Mr. Handrick available during the following week after the new year for a continuation of his deposition.
>
> And obviously if for any reason we refuse to do that under the circumstances, we would acknowledge that the other parties could move to compel as they deem appropriate.
>
> MR. POLAND: ***We're in agreement***.

(Dkt. # 89, Ex. 9, pp. 186–88) (emphasis added).

Plaintiffs' request for sanctions, based on the Legislature's adherence to this agreement, is disingenuous and should be denied.

CONCLUSION

For the foregoing reasons, the Legislature asks this Court to order that any acts or communications by Mr. Handrick that would be privileged if personally performed by the Legislature should be privileged and shielded from discovery; and any communications that Mr. Handrick had with legal counsel related to legal counsel's provision of legal services to the

Legislature be deemed privileged and shielded from discovery. Plaintiffs' Motion for Sanctions should be denied.

Dated this 29th day of December, 2011.

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